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Introduction

This is the first edition of our Guide to Government Contracting and Public Procurement in South Africa.

It is intended to answer some of the most frequently asked questions relating to public procurement, and to provide a concise overview of issues pertaining to government contracting and public procurement in South Africa.

In particular, this guide provides a broad overview of the legislative regime applicable to public procurement in South Africa, and considers the scope of application of this legislative regime to entities, contracts, privatisations and public-private partnerships (PPPs).

The guide also provides an overview of the applicable procedures for public procurement, the evaluation and award of tenders, changes to existing contracts, and enforcement, as well as the reforms that are expected.

Claire Tucker
Head of Public Law and Regulatory

The contents of this guide are for reference purposes only and should not be considered to be a substitute for detailed legal advice. If you require further information or specific advice, please contact one of the key contacts listed at the end of this guide.
Our Firm

Bowmans is a leading Pan-African law firm. Our track record of providing specialist legal services, both domestic and cross-border, in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With seven offices in five African countries and over 400 specialised lawyers, we are differentiated by our geographical reach, independence and the quality of legal services we provide.

We draw on our unique knowledge of the African business environment and in-depth understanding of the socio-political climate to advise clients on a wide range of legal issues. Our aim is to assist our clients in achieving their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. We have been named Africa Legal Adviser by DealMakers for the last two consecutive years (2014 and 2015) and South African Law Firm of the Year for 2016 by the Who’s Who Legal. Most recently we won the Banking, Finance and Restructuring Team of the Year, the Employment Team of the Year, and the Property Team of the Year Awards at the prestigious African Legal Awards hosted by Legal Week and the Corporate Counsel Association of South Africa in 2016.
Our Footprint in Africa

We provide integrated legal services throughout Africa from seven offices (Antananarivo, Cape Town, Dar es Salaam, Durban, Johannesburg, Kampala and Nairobi) in five countries (Kenya, Madagascar, South Africa, Tanzania and Uganda).

We work closely with leading Nigerian firm, Udo Udoma & Belo-Osagie, which has offices in Abuja, Lagos and Port Harcourt, and have strong relationships with other leading law firms across the rest of Africa.

We provide coverage of francophone OHADA jurisdictions across the continent (including Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo Republic, Democratic Republic of Congo, Gabon, Guinea, Ivory Coast, Mali, Mauritania, Niger, Rwanda, Senegal and Togo) from our office in Madagascar.

We are representatives of Lex Mundi, a global association, with more than 160 independent law firms in all the major centres across the globe. This association gives us access to the best firms in each jurisdiction represented.
Fairness, equitability, transparency, competitiveness and cost-effectiveness are the guiding principles, required by the Constitution in relation to all public procurement in South Africa.

We have had many successes in guiding both public and private sector clients through the complex regulatory regime of public procurement processes.

On the public sector side, we assist with the design and implementation of fair tender processes that meet the stipulated constitutional principles.

On the private sector side we advise clients on the procurement of goods and services by organs of state and assist with challenging tender processes which do not meet constitutional standards.

We advise corporate clients and government bodies on the application and interpretation of laws and on administrative action. We also regularly represent clients in proceedings before statutory bodies that regulate diverse areas of economic and social activity. Our collective expertise in constitutional and administrative law makes us leading practitioners in judicial review proceedings.
Government Contracting and Public Procurement in South Africa
OVERVIEW

1. What legislative framework is applicable to government contracting and public procurement?

The principle piece of legislation that regulates public procurement is the Constitution of the Republic of South Africa, 1996 (Constitution). Section 217 of the Constitution requires that when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

This constitutional requirement is echoed in section 51(1)(a) of the Public Finance Management Act 1 of 1999 (PFMA), which states that an accounting authority for, among others, a national or provincial department or public entity must ensure that the particular department or entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. The PFMA is implemented through the regulations published under it, namely the National Treasury Regulations (Treasury Regulations).

The Constitution permits organs of state (such as departments of government and public entities) to implement a preferential procurement policy that advances persons previously disadvantaged by unfair discrimination. Section 217(3) of the Constitution provides for legislation that will prescribe a framework within which the policy must be implemented to be enacted. In line with section 217(3) of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and the regulations published under it in 2011 (PPPFA Regulations) prescribe requirements regarding black economic empowerment (BEE) considerations for state tenders.

South Africa is a founding member of the World Trade Organisation (WTO) and is classified as a developed country. Despite this, South Africa has been able to negotiate favourable conditions and extended implementation periods for some of its sensitive economic sectors in the General Agreement on Tariffs and Trade (GATT).

South Africa is also a signatory to the WTO Agreement on Government Procurement (GPA) with certain reservations.

2. Is there a regulatory authority that is responsible for public procurement enforcement?

No. There is no specific regulatory authority in respect of public procurement. Most government departments or public entities determine and regulate their procurement systems internally in accordance with the regulatory requirements for such a system. However, at provincial level there are buying offices in operation in certain areas.

Public procurement is governed by the principles of administrative justice and an unfair decision can be taken on review to the High Court (see 17).

3. What are the overriding principles applicable to public procurement?

The overriding principles applicable to public procurement are the constitutional requirements of: fairness, equitability, transparency, competitiveness, and cost-effectiveness. These five principles are the standards against which all procurement by an organ of state is measured.

Fairness and equitability require that a procurement process be procedurally fair and are concerned with the manner in which the process is conducted. For example, all participants must be given the same information and opportunities.

Transparency requires openness and accountability. This means that the process must be conducted publicly and not behind closed doors. It means that procurement information must be generally available, procurement rules and practices should be standardised and made known, and information regarding government contracts and their award should be accessible.

Competitiveness and cost-effectiveness, which revolve around cost, require that an organ of state must, while taking into account the other principles, try to procure goods or services at the lowest possible cost and derive value for money.
While not inherently contradictory, there is a tension among the five principles and there may be circumstances where the achievement of one principle is not possible unless another is sacrificed. Therefore, when evaluating whether there has been compliance with section 217 of the Constitution, the five principles must be looked at as a whole rather than separately.

4. Are any industries subject to specific regulation?

There is no industry specific regulation under the legislative regime outlined above. However, there are some government policies relating to procurement within certain industries. For example, the Defence Industrial Participation (DIP) policy is mandatory for the Department of Defence and parastatal organisations in the defence industry.

This policy uses purchases and leases by organs of state in the defence industry as leverage to oblige a foreign seller of defence commodities or services to do defence-related business in South Africa. This is done on a reciprocal basis in order to advance military strategic and defence-related industrial imperatives. The policy applies to all foreign defence purchase and lease contracts above USD 2 million.

The DIP, which only focuses on the defence industry, is a variation of the National Industrial Participation Programme (NIPP) which applies to all purchase or lease contracts by state organs and parastatal organisations that have an imported content of USD 10 million or above.

5. What role does local content play in the procurement process, if any?

A recent trend in public procurement includes an increased focus on local content. This has seen the signing of the Local Procurement Accord on 31 October 2011 under the New Growth Path adopted by the government. The Accord is targeting 75% of public and private procurement to accelerate job creation and the attaining of the goals of the Industrial Policy Action Plan.

The PPPFA provides that there could be specific local content requirements in a tender which must be met for the tender to qualify for competitive adjudication. These will be set out in the request for proposal (RFP) document.

6. Is there a procurement portal and is it accessible?

In April 2015 a single eTender portal and central supplier database was launched. Operated by National Treasury (see www.etenders.gov.za), it aims to simplify, standardise and automate the procurement process. The portal carries tender notices, accompanied by official tender documents and relevant terms of reference of other descriptions of functionality as applicable, and award notices. The portal is accessible to the public.

All companies that wish to do business with government must be registered on the central supplier database for transactions with national and provincial government and their entities, as well as municipalities.

It is also now compulsory to procure routine goods and services through the centrally negotiated contracts in place. The process is managed through the gCommerce portal which automates ordering and allows for bulk discounts. The automation process is expected to reduce corruption by reducing the risk of human intervention to override established protocols.

SCOPE OF APPLICATION

1. Which entities must comply with the procurement rules? Are there any exemptions?

ENTITIES COVERED

In terms of section 217 of the Constitution, all organs of state in the national, provincial and local sphere of government or any institution identified in national legislation must comply with the procurement rules.

On the national level the PFMA applies to specific institutions including:

• National and provincial state departments as defined in the Public Service Act 103 of 1994.
• Listed major public entities, national government business enterprises and other public entities.
• Listed constitutional institutions.
• Provincial legislatures.
On the local level the MFMA applies to the following:

- All municipalities.
- All municipal entities.
- National and provincial organs of state to the extent of their financial dealings with municipalities.

The PPPFA Regulations are applicable to organs of state defined as including:

- National and provincial departments.
- Municipalities.
- Constitutional institutions.
- Parliament.
- Provincial legislatures.
- Other organs of state that are included in section 239 of the Constitution and are recognised by the Minister of Finance as institutions to which the PPPFA applies (no such other organs of state have been recognised by the Minister of Finance).

The PPPFA also applies to the specific public entities listed in the PFMA.

**EXEMPTIONS**

There are no particular exemptions from procurement rules but there is a measure of flexibility. For example, an organ of state may request exemption from any of the provisions of the PPPFA for reasons including that tenderers are likely to be international suppliers, among others.

This exemption provision is designed to work on a case-by-case basis and exempts the organ of state from provisions of the PPPFA in respect of a specific tender. Many of the public entities listed in the PFMA were specifically exempted from the provisions of the PPPFA until 7 December 2012, after which the exemption lapsed.

Section 92 of the PFMA allows the Minister of Finance to exempt entities from specific provisions of the PFMA or the Treasury Regulations, while section 177 of the MFMA allows the Minister of Finance to exempt any municipality or municipal entity from specific provisions of the MFMA.

2. **What contracts do procurement rules cover? Are there any specific thresholds?**

**CONTRACTS COVERED**

Public procurement rules apply to commercial contracts by organs of state for the:

- Acquisition of goods and services.
- Disposal and letting of state assets, including the disposal of goods no longer required.
- Conclusion of PPPs.

Access to state regulated assets is regulated through PPP agreements or through the regulations which are applicable in the specific sector. For example, in the minerals and petroleum sector applications to exploit such assets are governed by sector specific legislation.

However, the procurement rules do not prescribe the format for procurement. For example, open tendering is not required if there are compelling reasons not to conduct the process in this manner.

**SPECIFIC THRESHOLDS**

There are no specific thresholds to determine whether a contract is subject to the public procurement regime or not, but each entity is required to have its own internal policy that determines thresholds for the approvals required for various types of transactions.

3. **Are privatisations and PPPs subject to the procurement regime?**

**PRIVATISATIONS**

There are various provisions across public procurement legislation detailing how organs of state must dispose of public assets to private entities. The National Treasury has made regulations relating to how departments, constitutional institutions, and certain public entities should alienate, let or otherwise dispose of state assets.

Regulation 16A.7 of the Treasury Regulations states that disposal of assets must be at a market-related value and can be done by quotations, competitive bids or auction; whichever is the most advantageous for the state. The disposal of assets must be approved by the relevant treasury in accordance with regulation 19.6 of the Treasury Regulations.
The Municipal Asset Transfer Regulations, published under the MFMA, regulate how municipalities and municipal entities must dispose of state assets. A public participation process is required where the assets are high value, to allow the municipal council to make determinations. The municipal council must approve the disposal of the asset. In reaching the decision to approve the disposal of an asset, the municipal council must take into account a considerable number of factors listed in regulation 7, including:

- The risks and rewards associated with operation or control of the asset.
- The views and recommendations of National and Provincial Treasury.
- The interests of any affected organs and the local community.
- Compliance with the legislative regime that applies to the disposal.

**PPPs**

In the context of national or provincial government departments, PPPs are regulated by regulation 16 of the Treasury Regulations which states that PPP agreements must be procured in accordance with applicable procurement legislation. The Treasury Regulations deal with how PPPs must be implemented and set out the steps to be followed.

The principles set out under section 217 of the Constitution apply to PPPs when they perform a public function on behalf of an organ of state in terms of a PPP agreement.

Regulation 16 of the Treasury Regulations provides for strict national or provincial treasury supervision of PPP transactions. These take the form of approvals, based on listed criteria that must be obtained from the National and Provincial Treasury.

PPPs entered into by municipalities are regulated by section 120 of the MFMA and its Public-Private Partnership Regulations. These Regulations provide for how municipalities must go about concluding PPPs. This involves:

- Conducting feasibility studies.
- Soliciting the views and recommendations of the National and Provincial Treasury regarding the PPP.

- Complying with section 33 (ie regarding contracts having future budgetary implications) and 120(6) (ie regarding the actions to be undertaken after a feasibility study has been completed) of the MFMA.

### APPLICABLE PROCEDURES

**1. What procedures do regulated entities use when carrying out procurements? When is it appropriate to use each procedure?**

**AVAILABLE PROCEDURES**

The internal Supply Chain Management Policy of each department or entity must be followed. Treasury Guidelines and Circulars constrain the contents of these and the Treasury Regulations also impose specific requirements on certain entities.

For certain value thresholds there are prescribed procedures. This includes quotations or bidding procedures.

The legislative regime allows for a degree of flexibility and for exemptions to be granted if these can be justified. Any exemption granted must adhere to the constitutional principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

**COMPETITIVE TENDERING**

A competitive tender process is generally considered most likely to meet the requirements of the Constitution but, depending on the circumstances, it is not required by law.

The Supreme Court of Appeal has stated that fairness is inherent in an open competitive tender procedure, the very purpose of which is to ensure cost-effectiveness and competitiveness in a transparent manner. It is for this reason that a tender process is generally considered to be the most suitable method, as the constitutional requirements permeate the entire procedure for awarding or refusing tenders.

Nevertheless, sole source procurement may be justified with reference to the business needs of the entity or department and the practical problems that such a process would present in the circumstances.
2. Can an entity cancel a tender before awarding it to a tenderer?

Regulation 8(4) of the PPPFA Regulations provides that an organ of state may, prior to the award of a tender, cancel the tender if:

- due to changed circumstances there is no longer a need for the services, works or goods requested;
- funds are no longer available to cover the total envisaged expenditure; or
- no acceptable tenders are received.

This is however not considered to be a closed list.

In a recent judgment the Supreme Court of Appeal held that the decision to cancel a tender prior to its award is not administrative action and therefore cannot be challenged on review by a tendering party.

In cancelling a tender, an entity is generally considered to be required to act in a manner that is procedurally fair. This includes giving adequate notice of the intention to cancel the tender which indicates the main considerations for the contemplated action giving the affected parties the right to make representations.

EVALUATION AND AWARD

1. Are there any requirements concerning technical specifications of tenders?

The evaluation criteria for measuring technical specifications of tenders, referred to as "functionality" in the PPPFA Regulations, must be objective and must be specified clearly in any invitation to submit tenders.

A minimum qualifying score for functionality must be indicated and a tender is regarded as unacceptable if this score is not achieved. Tenders that have achieved this minimum score are then evaluated comparatively on BEE and price.

2. What are the requirements relating to contract award criteria?

Where the PPPFA applies, contracts are awarded based on a preferential points system. Under the preferential points system, points are allocated as follows:

- **Contracts below ZAR 1 million**: 80 points are allocated for price and functionality and the remaining 20 points for other specified goals.
- **Contracts above ZAR 1 million**: 90 points are allocated for price and functionality and 10 points for other specific goals.

The PPPFA has been aligned with the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act), so that a tenderer that has achieved level 1 status in terms of the BBBEE Act can earn the maximum points for specified goals under the preference point system. (It should be noted that from March 2015, a new method of calculating the BEE status level of an enterprise under the BBBEE Act applied, which has made it harder to attain a ‘good’ BEE status level.)

A tender is awarded to the overall highest point scorer unless there are objective criteria that justify the award to another tenderer. Where two tenders have equal scores, the one with the highest BEE rating must be awarded the contract and where the BEE ratings are also equal, the one with the highest functionality points must be awarded the contract (unless there are objective criteria that justify the award to another tenderer).

The Minister of Finance can exempt certain organs of state from the provisions of the PPPFA on request. Certain procurement processes obtain standalone exemption (such as the Independent Power Producer Programmes of the Department of Energy).
CHANGES TO AN EXISTING CONTRACT

1. Does an extension or amendment of an existing contract require a new procurement procedure?

There are value thresholds set for the extension or amendment of contracts. An extension or an amendment of an existing contract may require a new procurement procedure depending on, among others:

• The terms of the original agreement.
• The extent of the extension or amendment.
• The consequences for the contractor and other tenderers.

Recently the courts have held that where a public procurement agreement has a provision for renewal, the contract can be extended on the same terms without the need for a new procurement procedure.

However, where an amendment or extension of a procurement contract departs from what was originally put out to tender to the extent that the contractor benefits significantly or other tenderers may have tendered differently, a new procurement procedure may be required.

ENFORCEMENT

1. Who can bring a claim for non-compliance with procurement legislation?

The decision to award a contract to a particular party will, in most circumstances, constitute administrative action on the part of the organ of state. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) has broad ‘standing’ rules and effectively allows any person to institute proceedings before the High Court for the review of administrative action.

The court cannot review an administrative decision until all internal remedies provided for under the applicable legislation have been exhausted. An internal appeal is provided for in the municipal sector in the regulations under the MFMA. The regulated authority concerned will have to be a party to the litigation.

2. What are the available review procedures?

In the provincial and national sphere there are no special authorities that review claims of non-compliance with procurement legislation although National Treasury, the Auditor-General and the Public Protector can all investigate such claims and may assist. The regulated authority in question may have an internal appeal procedure but, once this is exhausted the courts are the main avenue to have the claim heard.

A party can apply for, and be granted, an injunction (interdict) from the court to stop the organ of state from contracting with another party or to prevent the implementation of the contract, pending the review of the decision to grant the contract. To succeed, such action must be launched without any delay. One of the factors the court will consider is whether there is a prima facie basis for the reviewing party to succeed on review.

In many circumstances, if it is found that there has been non-compliance with procurement legislation, the court is likely to set the contract aside and may refer the procurement decision back to the regulated authority to re-open the procurement procedure. However, this would depend on the consequences of this for the delivery of the relevant service by the state.

3. Are there any associated time periods?

Any application for judicial review brought in terms of PAJA must be made as soon as possible and at most within 180 days from the date the
person was informed of the decision, or the date on which any internal procedures are concluded (the 180-day limit may be extended). The review of a tender can take on average from six months to two years.

**REFORM**

1. Are there any proposals for reform of the procurement legislation? If so, when are they likely to be implemented?

A Public Procurement Bill, which will consolidate the fragmented legal and regulatory landscape, align preferential procurement with section 217 of the Constitution and modernise procurement rules, is being finalised and is expected to be released for comment during 2016.

Among other things, it will give the office of the chief procurement officer various powers and functions, such as:

- administering national legislation;
- ensuring that policies and legislation are implemented in an appropriate, consistent and systematic manner; and
- sanctioning non-compliance with national supply chain management and procurement policies, regulations, instructions and guidelines.

Draft amendments to the PPPFA Regulations were published in June 2016 for public comment. It is not yet clear when the final PPPFA Regulations will be published.

The Minister of Finance has announced that the initiatives of the chief procurement officer will be extended to include monitoring of state-owned companies’ procurement plans and supply chain processes as well as reviews of contracts above ZAR 10 million to ensure value for money.
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